

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 03-0293
Responsible Officer Liability—Duty to Remit Sales and Withholding Taxes
For Tax Year 2001

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ISSUES

I. Responsible Officer Liability—Duty to Remit Sales and Withholding Taxes

Authority: IC § 6-2.5-2-1; IC § 6-2.5-9-3; IC § 6-3-4-8; 45 IAC 2.2-9-4; *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995)

Taxpayer protests the Department's determination of responsible officer liability for sales and withholding taxes not paid during the assessment period.

STATEMENT OF FACTS

At all times relevant to the protest of the Department's determination of responsibility officer liability, taxpayer was an employee of the corporation. Taxpayer's job title was vice-president of engineering. The corporation manufactures and installs large-scale commercial skylights. Taxpayer's duties and responsibilities as an employee for the corporation were exclusively in the areas of engineering and, to a more limited extent, sales. Taxpayer's primary function was to design, develop, and test the skylights the corporation manufactured. Additional facts will be supplied as necessary.

I. Responsible Officer Liability—Duty to Remit Sales and Withholding Taxes

A gross retail (sales) tax is imposed on retail transactions made in Indiana. While this sales tax is levied on the purchaser of retail goods, it is the retail merchant who must "collect the tax as agent for the state." *See*, IC § 6-2.5-2-1.

Individuals may be held personally responsible for failing to remit any sales tax. In determining who may acquire personal liability, IC § 6-2.5-9-3 is applicable:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in IC § 6-2.5-3-2) to the department;
holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes to the state.

An income tax is assessed on wages that employers pay to their employees. The employer is responsible, and liable, for deducting, retaining, and paying “the amount prescribed in [the] withholding instructions. See, IC § 6-3-4-8(a). Like the sales tax, employers hold the withholding tax in trust for the state.

IC § 6-3-4-8(f) provides in pertinent part:

All money deducted and withheld by an employer shall immediately upon such deduction be the money of the state, and every employer who deducts and retains any amount of money under the provisions of IC § 6-3 shall hold the same in trust for the state of Indiana.

In order to determine which persons are personally liable for the payment of these “trust” taxes, the Department must initially determine which parties had a duty to remit the taxes to the Department. *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995) is instructive:

The method of determining whether a given individual is a responsible person is the same under the gross retail and the withholding tax.... An individual is personally liable for unpaid sales and withholding taxes if she is an officer, employee, or member of the employer who has a duty to remit the taxes to the Department.... The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that the taxes are paid.

The Indiana Supreme Court in *Safayan* identified three relevant factors:

- (1) the person’s position within the power structure of the corporation;
- (2) the authority of the officer or employee as established by the articles of incorporation, bylaws, or the person’s employment contract; and
- (3) whether the person actually exercised control over the finances of the business.

The Supreme Court also stated in *Safayan* that “where the individual was a high ranking officer, we presume that he or she had sufficient control over the company’s finances to give rise to a

duty to remit the trust taxes.” *Id.* at 273. The Department further notes that *Safayan* specifically rejects the defense of failure by an officer to exercise oversight.

In addition to the duties set forth *supra*, taxpayer also had other responsibilities, such as designing equipment for bending, extrusions, and break metal used in the skylight manufacturing process. Taxpayer also designed tanks for pretreatment, a part baking oven and overhead conveyor system for the painting system the corporation used. In addition, taxpayer also called upon architects and contractors in a sales capacity and assumed the duties of a project manager in connection with the corporation’s larger installation projects.

Previous to and/or during the relevant time period, the corporation decided to expand its plant on six occasions, taxpayer was consulted regarding the engineering and production capacity issues involved with the plant expansions and designed the building expansions. However, taxpayer did not participate in the basic decisions whether to expand or not, nor did he participate in any financial matters relating to the financing of the plant. Taxpayer’s duties did not include any office functions. He had no duties relating to the corporation’s accounting functions or the corporation’s financial management. Taxpayer did not participate in decisions regarding which creditors were to be paid. Taxpayer did not have access to the corporation’s books or accounting records and was not otherwise consulted regarding financial matters, nor did he attend meetings at which accounting or financial matters were discussed. Taxpayer did not participate in, prepare, or review the corporation’s tax returns, and was unaware the corporation had failed to pay its withholding and sales tax liabilities.

To the best of taxpayer’s knowledge, he was not a member of the corporation’s board of directors, and to the extent any corporate filings may have listed him as, such, the filings were made without his knowledge or consent. Taxpayer does not know, and did not know at the time, who was on the board; he assumes the owner was. Taxpayer did not sign checks on behalf of the corporation nor to his knowledge was he an authorized signatory on any corporate checking account. Taxpayer was compensated on a salary basis, and received 10% of the corporation’s stock as a bonus.

All major decisions of the corporation were made by its founder, president, and majority stockholder, Mr. X. Taxpayer’s receipt of the stock bonus had no effect on how Mr. X operated the corporation and stock ownership did not, as a practical matter, entitle taxpayer to any say in how the corporation was operated, or in any of its financial decisions. According to taxpayer, what Mr. X decided controlled, and his decisions were final. Mr. X relied on taxpayer’s expertise in engineering matters. Taxpayer’s role in the corporation did not extend beyond engineering matters and taxpayer had no role in the financial management of the corporation and was unaware of any tax problems.

Taxpayer had authority over design engineering matters, but Mr. X ran the company, founded it, and was the majority owner. Things were either done his way, or an employee who disagreed could “hit the highway.” There are no documents in existence showing taxpayer had the duty or authority to pay trust taxes. Taxpayer exercised no control whatsoever over the corporation’s business and finances; again, Mr. X had total control in those areas.

FINDING

Based on all the above, taxpayer's protest of the Department's determination of responsible officer liability is sustained.

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